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No. 129

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

REBA GOLDSTEIN, MARY MAYFIELD and PAUL J. PRYSE, *Petitioners*,

v.

GENERAL MOTORS CORPORATION and E. I. DU PONT DE NEMOURS AND COMPANY, *Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF FOR THE RESPONDENTS IN OPPOSITION

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 120

RITA GOTTESMAN, MARIE MATTIELLO and PAUL J. PEYSER, *Petitioners*,

v.

GENERAL MOTORS CORPORATION and E. I. DU PONT DE NEMOURS AND COMPANY, *Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

QUESTION PRESENTED

Whether this Court should review an order of a Court of Appeals by which that Court, in the exercise of the discretion confided to it by 28 U.S.C. § 1292(b), declined to permit the taking of an interlocutory appeal from a pretrial order of the District Court.

STATEMENT

The pretrial order of which petitioners complain was entered in a stockholders' derivative action instituted by petitioners as stockholders of General Motors Corporation against respondents shortly after this Court held in *United States* v. *E. I. du Pont de Nemours & Co. et al.*, 353 U.S. 586, that du Pont's ownership of stock in General Motors violated Section 7 of the Clayton Act. By consent of all parties, a number of such actions were consolidated in July 1958 into a single action, *Rita Gottesman, et al.* v. *General Motors and E. I. du Pont,* which was subsequently assigned to a single judge, The Honorable Charles M. Metzner, for all purposes.

The amended consolidated complaint contains fourteen counts.[1] The first eight are asserted under the antitrust laws. Each contains a separate recitation of facts claimed to justify relief. Joined with the factual allegations of each count is a separate paragraph invoking both the Sherman and Clayton Acts as alternative statutory bases for the liability claimed to have resulted by reason of the facts alleged. Thus, with respect to the first count, paragraph 14 of the complaint states:

> "At all times since said date [June 30, 1949, the date of the Government suit], and for some time prior thereto, the foregoing resulted in restraint of trade or commerce, in violation of Section 1 of the Sherman Act, and defendant du Pont attained or attempted to attain a monopoly position of a part of trade or commerce as a supplier of automotive fabrics and finishes, in violation of Section 2 of the

[1] For the Court's convenience, nine copies of the amended consolidated complaint have been lodged with the Clerk.

> Sherman Act, and it was reasonably probable that the effect of du Pont's acquisition and its continued holding and use of said General Motors stock was to restrain commerce in the United States as a whole and each quadrant, section and state thereof, and tended to give du Pont a monopoly position in said line of commerce, in violation of Section 7 of the Clayton Act."

Comparable allegations claiming a right to relief under both the Sherman and Clayton Acts on account of a single set of operative facts are made in each of the other seven antitrust counts. In the remaining counts of the complaint, each and every operative fact claimed to justify relief under the antitrust laws is repeated and claimed also to justify relief at common law. Thus, petitioners are seeking relief under a number of different legal theories, on account of a single course of alleged conduct.

Extensive pretrial proceedings have taken place in the District Court,[2] and that Court has made numerous pretrial rulings. For example, the Court has ruled that Federal Rule of Civil Procedure 23(b)(1) applies to causes of action based upon federal law, see 28 F.R.D. 325; has accepted petitioners' position that the running of the statute of limitations was tolled until March 1, 1963; and has rejected respondents' position that petitioners are precluded from taking a position in this litigation inconsistent with that taken by General

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[2] Thus by stipulation of the parties virtually the entire record of the proceedings before the trial court in the prior Government litigation has been introduced into evidence in this action. Respondents have tendered for examination some thirty witnesses who testified in that prior litigation, and petitioners have examined most of those witnesses.

Motors in the Government action, see 1963 Trade Cas. ¶ 70,910.

The Court of Appeals for the Second Circuit is fully familiar with this litigation. In addition to the denial of interlocutory review here attacked, in 1959 the Second Circuit denied a petition by respondents for interlocutory review of an order denying a motion to dismiss the complaint. In May 1964, that Court denied a petition for mandamus directed at an order Judge Metzner entered on July 15, 1963, which stayed prosecution of a suit brought by another General Motors stockholder, Schiff, who is represented by the counsel for petitioners in this Court, and whose case is identical in all respects with petitioners' except for the period of time for which recovery is sought. And, on June 18, 1964, the Court of Appeals dismissed as presenting no question not already decided on the *Schiff* petition for mandamus two appeals from an order Judge Metzner entered on April 15, 1964, refusing to consolidate the *Schiff* case with that brought by the petitioners.

The pretrial order which the Court of Appeals declined to review at this stage of the proceedings in the District Court was entered in the following circumstances: In numerous pretrial documents and conferences, petitioners have asserted that the judgment of this Court finding du Pont in violation of Section 7 of the Clayton Act established the existence of an unlawful restraint upon General Motors. The District Court, after receiving briefs and hearing argument, on November 12, 1963, entered an order ruling as to the significance of that judgment in the trial of this action. Although petitioners presumably sought review of the entire order, two provisions of that order were specifically challenged: (1) the ruling that insofar as

it alleges a violation of Section 7, the complaint fails to state a claim upon which relief can be granted, and (2) the ruling under Section 5 of the Clayton Act that the judgment in the Government suit may be used by petitioners in the trial of this case only for historical purposes and as background material because the two actions cover different time periods.[3]

REASONS FOR DENYING THE WRIT

The Court of Appeals did not deem it appropriate to exercise its discretionary authority to review, prior to trial in the District Court, the interlocutory order of the District Court described above. The ruling of the Court of Appeals is not a final or even an interlocutory determination of any substantive question presented in this case. Accordingly, the petition for certiorari, which is directed almost exclusively to the merits of the District Court's pretrial order, is largely beside the point.

Prior to the enactment of Section 1292(b) of the Judicial Code, appeal from the district courts to the courts of appeals could in general be had only from final judgments. In Section 1292(b) Congress made a limited modification of the final judgment rule by giving the courts of appeals the authority to undertake review of interlocutory district court orders on an appropriate certification by the district court.

Although Congress thus authorized the courts of appeals to accept interlocutory appeals, it carefully re-

[3] Petitioners apparently also now attack as too narrow paragraph 1(f) of the District Court's order relating to du Pont's supposed use of "its stock interest in General Motors to entrench itself as the primary supplier to General Motors of automotive finishes and fabrics." Petitioners did not challenge this provision of the order when asking the Court below for leave to appeal.

frained from compelling them to do so. Rather, as the very words of the statute state, it committed to the discretion of the courts of appeals the determination as to whether to undertake interlocutory review in any instance where the necessary certification had been made by the district court. As the Senate Report shows, the discretion thus lodged by Congress in the courts of appeals was intended to be fully as broad as that of this Court in exercising its discretionary appellate jurisdiction:

> "the court of appeals * * * may refuse to entertain such an [interlocutory] appeal in much the same manner that the Supreme Court today refuses to entertain applications for writs of certiorari." S. Rep. No. 2434, 85th Cong., 2d Sess. 3 (1958).

In the instant case the Court of Appeals has, after consideration of lengthy briefs of the parties directed largely to the question whether review at this time would materially advance the ultimate termination of the litigation, exercised its discretion to deny interlocutory review. This discretionary ruling, necessarily made in a highly particularized factual context, does not and could not present any issue of general importance or constitute, as petitioners suggest, an appropriate point of departure for this Court in giving guidance to the inferior federal courts in the application of Section 1292(b).

It may be noted that petitioners' extreme assertions as to the consequences of the District Court's pretrial order are in any event without merit. Insofar as that order relates to Section 7 of the Clayton Act, it goes to the legal theory advanced by petitioners and not to their factual claims. As noted above, each count of the complaint pleads a single set of facts, and demands

relief on a number of alternative legal theories. No single fact is alleged to be relevant only to the charges made under the Clayton Act and not to those under the Sherman Act or the common law. Thus, this aspect of the District Court's pretrial ruling has done no more than reject one of the alternative legal theories advanced by petitioners in support of a single "aggregate of operative facts," *Original Ballet Russe, Ltd.* v. *Ballet Theatre, Inc.*, 133 F.2d 187, 189 (2d Cir. 1943). It in no way curtails the nature or the scope of the evidence that petitioners may produce in support of the factual allegations of their complaint.

As for that aspect of the order dealing with the significance under Section 5 of the Clayton Act of the judgment in the prior Government case, virtually the entire record in that case, including all the exhibits listed in the schedule printed in petitioners' appendix, is already in evidence in this case. Petitioners will therefore be free to urge the trial court to find on the basis of that record any facts that they claim that the Government record demonstrates.

Moreover, petitioners err in asserting that if review of the District Court's order awaits the entry of final judgment, "the entire matter will have to be sent back for a new trial" in the event that order is overturned. (Petition for Certiorari, p. 12.)

It is, in fact, likely that appellate review of the District Court's order will never be necessary. In the first place, petitioners can in no event recover in this case, on any legal theory, unless they first succeed in establishing actual injury to General Motors by reason of du Pont's ownership of General Motors stock. Petitioners' position with respect to this evidentiary burden was not and could not have been affected by the

District Court's order. Should plaintiffs fail at trial to discharge this burden, the question of the correctness of the District Court's pretrial ruling will necessarily be moot.

Alternatively, in the unlikely event that the District Court were to determine after trial that the evidence had demonstrated a violation of the Sherman Act—contrary to the finding of the District Court in the Government suit—and this ruling were to be affirmed on appeal, there would be no occasion to reach the question of the correctness of the District Court's pretrial order.

The question of the correctness of the District Court's order would be reached after final judgment only on the multiple assumptions that (1) the trial court will decide the case after trial in favor of respondents; and (2) that on appeal it will be determined that petitioners had made a showing of injury to General Motors but (a) that petitioners had not established a violation of the Sherman Act, or (b) that the trial court's conclusions based on the evidentiary record in the Government case were inconsistent with those of this Court in that case. But even if these eventualities occur so that the question of the propriety of the District Court's order is then reached, and it is thereupon determined that that order was in whole or in part erroneous, the consequences of that determination would not be a new trial. Rather, since this case will be tried to the District Court rather than to a jury, reversal on such grounds would require at most reassessment by the trial court, within a somewhat altered legal framework, of a record already made.

CONCLUSION

For the foregoing reasons the petition should be denied.

Respectfully submitted,

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